BRIEF IN SUPPORT OF PETITION.

I.

Opinion of Court Below.

The decision of the Circuit Court of Appeals has been reported in 130 Federal Reporter, Second Series, at page 330. The opinion was filed and judgment entered thereon on August 28, 1942. The opinion is reproduced in the Record.

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this court is invoked has been made in the Petition.

Reference is respectfully made thereto.

III.

Statement of the Case.

Since it is petitioners' principal contention that the reception of much evidence was not only erroneous but was, in the presence of direct contradiction in the admittedly competent evidence, prejudicial, it is deemed necessary to give the court a very brief synopsis of the concededly proper evidence before indicating the matters upon which petitioners rely as entitling them to a reversal at the hands of this court.

1.

The Admittedly Competent Evidence.

The gist of the admittedly competent evidence may be briefly summarized as follows:

Samuel Weiss, the proprietor of a wholesale jewelry business in New York, while *en route* from Fort Wayne, Indiana to Detroit, Michigan, was held up at a point near the outskirts of Detroit on August 28, 1940, was abducted and driven through and about Detroit for some hours, and at about 10:00 o'clock in the evening was robbed of jewelry having a value of $11,000 (R. 27 to R. 32). His abductor was admittedly John McMann, a co-defendant of petitioners. Some confederate, or confederates, who had driven McMann to the place of the abduction, followed Weiss and McMann during Weiss's enforced tour of Detroit and its environs. This confederate, or, if there were more than one, then one of such confederates, assisted in effecting the robbery; but since Weiss was compelled to keep his head averted, he at no time saw this second assailant (R. 27 to 32).

John McMann, who, having pleaded guilty to the offense in question, took the stand as a government witness, told in substance the following story:

He had known the petitioners in 1925 and 1926, when all three of them were serving sentences in Missouri State Penitentiary (R. 70). Having been released from that prison in 1940, many year after petitioners had been discharged, he met them in a chance encounter in Detroit in the latter part of April, 1940, a date positively and repeatedly fixed by him (R. 73, 90, 94, and 100).

He testified that from this meeting in Detroit, he immediately drove with Banning and Williams to Chicago

and was continuously in their company until August 28, 1940 (R. 74, 97, 98, 99, 102, 103, 110 and 111).

But the government stipulated that from April 24, 1940 until the 30th of that month Banning was in jail in Louisville, Kentucky (R. 162).

McMann further testified that from the end of April through August of 1940, he was registered at the Raleigh Hotel in Chicago under the name of "Jack King" (R. 74, 97, 98, 99, 102, 103, 110 and 111). But the manager of the Raleigh Hotel testified that no such name appeared on the registry of that hotel *at any time* during the months in question; and the absence of the name "Jack King" from the hotel records was verified by representatives of the Federal Bureau of Investigation (R. 174 and 175).

McMann testified that he and petitioners were, during the months from April through August, 1940

> "gone every day during the week, all week, each week,"

on reconnaisance tours through Illinois and adjacent states in search of jewelry salesmen (R. 76).

But the government's own witness, Bonnie Joy Carroll, testified that McMann lived with her as his mistress in Peoria, Illinois, from June 7, 1940 until the "latter part of July of that year." She further testified that during this period

> "he was home every evening. He was there when I got home from work." (R. 111 to 120).

Thus, without considering a word of the evidence of the defense, it appears that, according to McMann's testimony, he met petitioners at the time when Banning was

in jail, associated with him continuously during the summer of 1940,

"every day, all week, each week"

at a time when, by the government's own proof, he was spending "every day" with his mistress in Peoria, and that his headquarters during the whole of the summer were at the Raleigh Hotel in Chicago, where he was registered under the name of "Jack King," although no such name appears on the registry.

The evidence of the petitioner Banning is compelling. He testified that on August 27, 1940, on which day, according to McMann, he, McMann and Williams were in Indiana following Weiss, he was in fact a passenger en route from Louisville to Cincinnati, Ohio on an American Airlines plane (R. 164 to 167). His testimony, which is disputed by no one but McMann, is corroborated by the American Airlines passenger registry, on which registry the name "Frank E. Foster" appears. (Banning had changed his name to Foster after having been discharged from the Missouri State Penitentiary.) The handwriting in which that name is written on the passenger registry corresponds, as the government does not dispute, with his signature on the mortgage papers for his home (R. 168 to 170). (*Passenger list,* Defts. Ex. B, admitted in evidence, R. 165. *Building and Loan Association Records,* Defts. Exs. C to H, admitted in evidence, R. 168-169).

Williams' account of his movements on the 26th and 27th of August is likewise convincing. On the nights of the 26th and 27th of August, 1940—when, according to McMann, Williams, Banning and McMann were following Weiss through Indiana and Michigan—he was a visitor at the home of his wife's uncle, Edward LaFont (R. 205, 206).

Williams testified that on the 28th—the day of the robbery—he was at home in Chicago all day, except that he went to the Lynn Hardware Store at 5500 North Clark Street where he purchased paint, putty and cleaning soap for use in the apartment building which he operated. On his way home from the hardware store, he pawned his watch for $5.00 in order to raise funds until he might collect his rent on the first of the month (R. 206).

The record evidence of the pawning of his watch furnishes conclusive corroboration. The pawnbroker, George Toll, produced the records of his establishment—his day sheet (Defendants' Exhibit L), his day book (Defendants' Exhibit N), and a copy of the pawn ticket bearing Williams' signature (Defendants' Exhibit N). Defendants' Exhibit N bears a carbon copy of the same signature of Williams as appears on Defendants' Exhibit K, which is the contract of pawn retained by this petitioner (R. 212 to 216). This signature was executed by the person making the loan in the presence of the pawnbroker concurrently therewith, and bears a serial number relating to the day sheet, on which the entries were placed by the pawnbroker at the time of the transaction. The pawnbroker had no personal recollection of Williams as his pledgor, but the routine enforced upon pawn shops in Chicago by ordinance, police regulation and the self-protection of pawnbrokers, compelled him to note, in the ordinary course of his business identifying facts about his customers, and likewise under such routine Defendants' Exhibits N and K were signed in his presence (R. 212 to 217).

It is important to observe that the regulations required the pawnbroker to furnish a duplicate of his day sheet to the Detective Bureau of Chicago every night. The duplicate of the day sheet in question duly appears in the bound records of the Chicago Police Department as

having been furnished to the police on August 29, 1940, having been mailed the night before.

Roy James McDonald, the police officer assigned to the Chicago Pawn Shop Detail, produced the bound volume containing the reports of every pawn shop in Chicago for August 28, 1940, and testified that this official record had remained in the vault of the police department until subpoenaed. Defendants' Exhibit O was conceded by the District Attorney to have been a duplicate carbon copy of the day sheet (Defendants' Exhibit L) (R. 218 to 220). This evidence could not have been fabricated without the complicity of both the pawnbroker and of the Pawn Shop Detail of the Police Department of the City of Chicago.

It is not disputed that both petitioners had criminal records, nor is it denied that both of them had encountered McMann in Chicago. Indeed, as has been pointed out, McMann could not be expected to have chosen as persons whom he might sacrifice any one who did not fulfill the requisite of, first, having a criminal record, and, second, having had his acquaintance.

We note very briefly the evidence concerning one Johnny McQuade. McQuade was not indicted for or accused of the crime in question. However, McMann admitted, on cross-examination, that he had met McQuade in Peoria, that he and McQuade jointly participated in a series of robberies during the summer of 1940 and that both of them were subject to suspicion of guilt in connection with the murder of one Johnny Tiszak in Peoria in the summer of 1940 (R. 111 to 120). It is an arguable inference that, since McMann admittedly had an accomplice in the robbery of Weiss, McQuade was that accomplice.

Williams testified that in the early morning of August 29, 1940, the morning after the robbery of Weiss, he

had, in response to a telephone call from McMann, met the latter on the south side of Chicago and that at McMann's request he had checked into a hotel room with McMann upon the latter's promise to pay Williams money owed him (R. 208).

The following comments upon and inferences from his testimony are important: Williams testified that McQuade, McMann's admitted confederate in a series of robberies—a confederate who was by no means free of suspicion in the Weiss robbery—was present at the time. McMann asked Williams to keep $340.00 for him and said, "Don't let McQuade know I gave you this money" (R. 232). It is a fair inference, entirely consistent with the character of McMann as abundantly shown by his own testimony, that this $340.00 was part of the proceeds of a robbery and that McMann was anxious to exclude this sum from the division of the proceeds with McQuade. It is extremely likely that, Williams and McMann having been fellow prisoners at one time, Williams would, upon meeting him years later in Chicago, advance him small sums of money. Nor is it unlikely that McMann, who knew Williams to have lived in Chicago for a number of years and to have been a former convict, would think it worthwhile to ask Williams if he knew of a fence. It is extremely likely that McMann would use the repayment of a loan, trivial in comparison with the proceeds of a jewel robbery, but important to Williams, as the pretext for getting Williams to come to the south side of Chicago to find out whether Williams could be used as an avenue to a receiver of the stolen property.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in not reversing each of the judgments of the District Court.

2. The trial court erred in permitting cross-examination of each of the petitioners, respectively, not only concerning previous arrests, not culminating in conviction of felonies, but concerning the circumstances of such arrests and concerning alleged resistance to law-enforcing officers on occasions years before the time of the crime for which the petitioners were on trial.

3. The trial court erred in permitting cross-examination of Williams concerning a trial for another jewel robbery, upon which trial he was acquitted, and concerning the nature of his defense and the identity of his witnesses on that trial.

4. The trial court erred in indulging, in the presence of the jury, in improper comment and characterization concerning the evidence as to the nature of Williams' defense in the trial last above mentioned.

5. The trial court erred in permitting accusation, in the form of cross-examination, of the petitioner Banning with respect to an alleged offer of bribe to a police officer, in a transaction in no way connected with the crime for which either of the petitioners was on trial.

6. The trial court erred in admitting evidence impeaching Banning's denial of accusation of the offer of the bribe last above mentioned.

7. The trial court erred in permitting cross-examination of each of the petitioners, separately, as to their acquaintance with a person alleged to have been convicted, subse-

quently to the time of petitioners' acquaintance with him, of a jewel robbery in no way connected with the crime for which the petitioners were on trial.

8. The trial court erred in admitting hearsay evidence that the person last above mentioned as having been convicted of an independent jewel robbery was in fact so convicted, and that the subject matter of the robbery was $15,000 in jewels.

9. The trial court erred in admitting into evidence hearsay testimony that a blackjack, revolver, and mask were found in the apartment of the petitioner Banning at the time of his arrest.

10. The trial court erred in denying the petitioners' motion for a new trial.

11. The trial court erred in rendering judgments, respectively, upon the verdicts.

12. The Circuit Court of Appeals erred in not holding that each of the errors above complained of required a reversal of the judgments under review.

13. The Circuit Court of Appeals erred in not holding that the cumulative effect of all the errors above mentioned did not constitute reversible error.

14. The Circuit Court of Appeals erred in denying the petition of the petitioners for rehearing.

V.

SUMMARY OF ARGUMENT.

1.

The evidence of guilt is doubtful and uncertain. The evidence of innocence is substantial and persuasive. Therefore, if serious error has intervened, the convictions should be reversed.

The errors argued under this heading are the errors assigned in the immediately preceeding section of this brief, to which assignment of errors, as a synopsis of the argument, reference is hereby made.

2.

The Circuit Court of Appeals has so far sanctioned a departure by the trial court from the accepted and ordinary course of judicial proceedings as to call for an exercise of this court's power of supervision.

3.

The errors assigned gravely prejudice petitioners and require a reversal of the judgments now under review.

VI.

ARGUMENT.

1.

The evidence of guilt is doubtful and uncertain. The evidence of innocence is substantial and persuasive. Therefore, if serious error has intervened, the convictions should be reversed.

The only allusion made in the opinion of the Circuit Court of Appeals to the weight of the evidence is the following language:

> "McMann was a competent witness and although the jury could have found that his character was so bad as to permit an inference that evil and good had the same meaning to him and that it was a matter of indifference to him what he stated on the witness stand and disbelieved everything he said, his credibility and the weight to be given to his testimony were for the jury. * * * The necessity, if any, of corroborating McMann is not an issue on this appeal." (R. 291 and 292.)

Now, it is perfectly true that the question of the weight of the evidence is for the jury and not for a court of review; but it is equally true and equally as fundamental that, when error has intervened, a court of review must determine not only that there is evidence in the record which *in the absence of incompetent evidence* would warrant the affirmation of a conviction but whether, in the *presence* of incompetent evidence, the proof is certain and demonstrative or uncertain and doubtful.

In dismissing the question of the weight of the evidence, as

"one for the jury,"

instead of considering the conflicts in the proof, **not** for the purpose of invading the province of the jury but, on the contrary, for the purpose of ascertaining whether the competent evidence was so conclusive as to render the intervention of error harmless, the Circuit Court of Appeals departed from the precept of a fundamental canon of judicial review.

The principles of review relied upon by petitioners may be stated as follows:

> *First:* A conviction will be affirmed, even though there is a substantial conflict in the evidence upon the question of the appellants' guilt, *provided that the record is free of error which would have prejudiced the jury, so that the verdict may be regarded as representing a determination of the question of guilt upon a fair trial.*
>
> *Second:* A conviction will be affirmed, even in the presence of incompetent testimony and other error, *provided that there is no substantial conflict in the evidence.*

But where there is a substantial conflict in the evidence *and* substantial error in the record, the government will not be heard to say that the evidence did not prevail upon the jury to render the verdict of conviction; and, as the Supreme Court of the United States has declared in *McCandless* v. *United States*, 298 U. S. 342, the conviction must be reversed "unless it *affirmatively* appears from the whole record that it was not prejudicial" (Italics of the Supreme Court).

The following authorities among, of course, a great many others, support the rule last stated:

McCandless v. *United States,* 298 U. S. 342.
Neeper v. *United States,* 93 Fed. (2d) 409.

Indeed, nearly every case cited in appellants' original brief in which a conviction was reversed, held—not that the verdict was against the manifest weight of the evidence—but that, there being a substantial contradiction in the proof, error in the admission of evidence, cross-examination, comment of the trial court, or other matter required that the case be again tried upon a record free from the infection of prejudicial error.

We have already stated the full substance of the admittedly competent evidence. The petitioners deem the following considerations sufficient to sustain the contention that the evidence of guilt was doubtful and uncertain:

As we have indicated, McMann testified that he met petitioners in Detroit when, as a matter of **fact,** Banning was, by the government's stipulation, in jail.

McMann testified that he and petitioners spent the summer in touring Illinois and other states in search of jewelry men when, by the government's own evidence, he was living in Peoria with his mistress and, by his own admission, was participating in robberies with McQuade.

He testified that his headquarters in Chicago were the Raleigh Hotel, where he lived under the named of Jack King. No such name appears on the register at any time during the summer of 1940.

Except for the testimony of the victim that the voice of Williams resembled the voice of an assailant whom he did not see, not a single person except McMann implicated either of the petitioners in the crime for which they were on trial. McMann admitted that during the summer of

1940 he had committed a series of robberies with one Johnny McQuade. He admitted that he and McQuade had visited a man named Tiszak, that Tiszak had been killed on the night of their visit, and that both of them were subject to suspicion in connection with the murder.

Although McMann undoubtedly had at least one accomplice in the robbery of Weiss, it is fairly arguable that that accomplice was McQuade. He had every reason to shield McQuade.

It is respectfully submitted that the foregoing considerations are sufficient to demonstrate that the competent evidence of guilt was far from conclusive and that the evidence of innocence was substantial.

Under the authorities already considered, the teaching of which authorities is axiomatic, where it appears upon such a record that substantial error has intervened,

> "the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have." (*Neeper* v. *United States,* 93 Fed. 2d, 409.)

2.

The Circuit Court of Appeals has so far sanctioned a departure by the trial court from the accepted and ordinary course of judicial proceedings as to call for an exercise of this court's power of supervision.

It appears from appellants' statement of the case and from the considerations developed in Point I of this Argument, that at the utmost, the evidence of guilt is doubtful and uncertain. The evidence of innocence is substantial and impressive.

It is the contention of appellants that in addition to the admittedly competent evidence discussed under Point I,

the court received flagrantly incompetent evidence and permitted grossly improper accusation of the petitioners in the form of questions suggesting that they were implicated in unrelated crimes; that both the prosecution and the court seriously prejudiced petitioners by improper comments; and that a verdict of guilty in the face of the absolute and flat contradiction of McMann's testimony cannot be explained otherwise than by supposing that it was induced by prejudice engendered by such improper evidence and misconduct.

The substance of the evidence which petitioners contend was improperly received and of the questions and comments on the part of the prosecution and of the trial court has already been fully summarized in the Statement of the Case. For the immediate convenience of the court in considering this Argument, we again briefly indicate, without repeating our summary, the nature of the incompetent and improper matters complained of as prejudicial, with reference to the record.

Evidence in Chief.

1. The Government's evidence in its case in chief that Banning and Williams had participated in the robbery of one Sol Roseman, a jewelry salesman, in Fort Wayne, Indiana, on October 16, 1940 (R. 84 to 89, and 136 to 146).

2. The Government's evidence in its case in chief as to detailed facts and circumstances of the robbery of Roseman in Fort Wayne, Indiana, on October 16, 1940, and the value of the merchandise taken from Roseman (R. 84 to 89, and 136 to 146).

3. The evidence introduced by the Government in its case in chief that at the time of the arrest of Banning, ten months after the robbery of Weiss, a Colt automatic pistol was found in the compartment of his car (R. 148).

Improper Cross Examination.

4. The cross-examination of Williams concerning the throwing of red pepper in the eyes of an officer, his attempt to escape and a shooting, all of which occurred in Texas in 1919 (R. 221 and 222).

5. The cross examination of Banning as to his being shot in connection with an arrest in Council Bluffs, Iowa, in 1931, under suspicion of a bank robbery for which *he* was never tried and of which he was never convicted (R. 184).

6. The Government's interrogation of Banning as to whether he had sued the police for false arrest in 1931 and as to whether it was the habit of the police to shoot innocent people (R. 184).

7. The cross examination of Williams as to his association with one Howard Graves, in Nashville, Tennessee, in February of 1940 (R. 226 to 229).

8. The repeated questioning of Williams as to whether or not Graves was not confined in the Ohio State Penitentiary under sentence for a jewel theft which occurred in Cleveland, Ohio, it not being shown that either of appellants was implicated in that offense (R. 227 and 228).

9. The cross examination of Williams as to an attempted escape in Nashville, Tennessee, in February of 1940, during which he broke his arm (R. 233 to 236).

10. The cross examination of Williams as to the nature of the offense for which he was arrested in Nashville, Tennessee, in February of 1940 (R. 235).

11. The cross examination of Williams respecting the nature of the defense which he offered in a prosecution for another jewel theft in Omaha, Nebraska, the names of

his witnesses and the tenor of their testimony (R. 241 to 248).

12. The cross examination of Banning as to whether he had on March 22, 1941, offered a sum of money to a policeman as a bribe to secure the fabrication of evidence which he proposed to use in his defense in a pending prosecution in Omaha, Nebraska (R. 195 to 199).

Evidence in Rebuttal.

13. The Government's evidence in rebuttal that in 1936 Banning was seen outside West Point, Nebraska, in the company of Howard Graves at a time when the witness, Vaughn Salter, had been robbed of certain diamonds and jewelry (R. 251 to 257).

14. The testimony of the witness George Smyth in the Government's rebuttal that Howard Graves, with whom Williams had been arrested in Nashville, Tennessee, in February 1940, and with whom Banning had been seen in West Point, Nebraska in 1936, had been convicted in Cleveland, Ohio and sentenced to a term of from ten to twenty-five years and his hearsay statement that Graves' offense involved the theft of jewels (R. 257 to 259).

15. The evidence presented by the Government in rebuttal that in March 1941 Banning had offered John Pigga, the chief of police of Calumet Park, Illinois, $700.00 if he would provide Banning with proof of an alibi at the time of Banning's supposed offense in Omaha, Nebraska (R. 259 to 265).

16. The hearsay evidence presented by the Government in rebuttal that revolvers, ammunition, a black jack and mask were brought to the State's Attorney's office in Chicago in March of 1941 which the witness said by hearsay were obtained from Banning's apartment (R. 264 and 265).

Comments by Trial Judge.

17. The court's comment in the presence of the jury that he would permit the Government to show that Williams used the defense of an alibi in the Omaha prosecution "to get out of this case there" (referring to a prosecution for an offense in Omaha of which Williams was acquitted (R. 241)).

18. The remark of the court indicating that in Williams' defense of the Omaha prosecution he had used a "fake detective" (R. 248).

* * *

Counsel for petitioners are confident that this court is thoroughly conversant with those fundamental principles of law of criminal trials which are involved in the present case. Indeed, every rule upon which petitioners rely is axiomatic. Therefore petitioners will neither cite at length nor quote elaborately from the legion of pertinent authorities, but will devote the remainder of their argument to demonstrating wherein the teachings of the authorities considered are apposite to the case at bar.

The principles upon which the petitioners rely as applicable to this case, and as requiring a reversal of the judgments under review, may be concisely stated, without immediately citing supporting authorities, in the form of the following concatenation of propositions:

I. Although former *convictions* of crimes involving moral turpitude, even though unrelated to the offense for which a defendant is being tried, may be shown against a defendant who has testified, precisely as they may be shown against any other witness, evidence of independent crimes, otherwise than by proof of *conviction* of such crimes can not in general be shown even for the purpose (a) of

showing the likelihood of the defendants having committed the crime in question, or (b) for the purpose of imputing the credibility of the defendant as a witness, *even when the prosecution offers to prove the fact of such crime by direct evidence which would be necessary if the crime could be shown at all.*

II. Even if it were proper to show the *actual fact* of past crimes, as distinct from the *fact of conviction therefor* (which assumption is not the law), such showing could not be made merely by proving such matters as that one defendant had been shot by the police nine years before the offense for which he was on trial, in an attempt to escape arrest upon a charge for which he was never convicted; that another had been injured in an automobile accident while fleeing from the police in the company of a man who had been subsequently arrested for and convicted of a completely independent crime, the defendant not being shown to have been implicated in the latter offense; evidence that a defendant had been tried *and acquitted* upon a similar charge, together with the nature of his defense of that charge; and like evidence tending to show mere suspicion of previous criminality.

III. Even if it were proper to cross-examine the defendants with respect to supposed criminal acts and conduct, not resulting in convictions and totally unrelated to the offense in question, such as the petitioner Banning's allegedly having offered a bribe to a police officer approximately seven months after the termination of the alleged conspiracy in the present case, the association of each of the petitioners, separately, with a man who, subsequently

to any time when either of the petitioners were shown to have been in his company, was convicted of a crime, it was still not proper to permit the *impeachment* of the petitioners in respect to their answers disclaiming such criminal activity or acquaintance. The salutary rule, as well grounded in natural justice as it is established by the authorities, categorically interdicts the impeachment of a witness as to matters which, even though they may be deemed properly the subject of cross-examination, he may not be supposed to be able to anticipate and encounter by independent evidence. Permitting the police officer to contradict the petitioner Banning by testifying to the details of the supposed offer of the bribe was, upon the plainest principles, impeachment with respect to a collateral matter.

IV. Even if it were proper not only to permit the cross-examination of the petitioners with respect to supposed unrelated criminal activity, and even if it be further assumed that it was proper to permit not only such cross-examination, but affirmative impeachment, in rebuttal of such testimony, it was still not proper to allow such impeachment *by pure hearsay evidence.* The testimony offered as showing that Howard Graves, a man in nowise implicated in the crime for which the petitioners were upon trial, was simply the statement of a police officer that he was in the courtroom when one Howard Graves was convicted, that the crime was a jewel robbery involving gems of the value of $15,000, and that this man was the same Howard Graves who had been arrested in Tennessee.

V. It would not have been proper to show that a black jack, a mask, and a revolver were found in Banning's

apartment at the time of his arrest, approximately seven months after the termination of the alleged conspiracy, when no black jack or mask was shown to have been an implement of the crime, and would not have been proper even if competent evidence of the finding of those things had been offered.

VI. Even if it had been proper to show the finding of the items last enumerated, by competent evidence, it was not proper to undertake to show that fact by the mere hearsay statement of a police officer who said no more than that he was in the State's Attorney's office in Chicago when the articles in question were brought to that office, and that they were found in Banning's apartment, he not having participated in any search of that apartment.

VII. Even if it had been proper for the trial court to admit evidence that the petitioner Williams had been tried and acquitted of a crime in Omaha, Nebraska, and even if it had been proper for the court to permit detailed inquiry as to the nature of his defense and the detail of the testimony of his witnesses on that trial, it was grossly improper for the trial court to characterize a man who was one of Williams' witnesses in the Omaha trial as a "fake detective"; nor would it be proper for the court, in admitting this evidence, to state that he was allowing the Government to show the evidence that the defendants had "put up to get out of that case there."

VIII. Even if the petitioners' voluntary testimony as to certain arrests not culminating in convictions opened the door to cross-examination as to other arrests likewise not leading to conviction, it was improper to permit cross-examination as to the details of

such arrests, such as the cross-examination of Williams as to whether, twenty years before the robbery in question, he had shot a deputy sheriff and thrown red pepper in his eyes, cross-examination of the petitioner Banning as to whether, ten years before the robbery in question, he had been shot by the police, and other like questions as to the totally irrelevant but none the less highly inflammatory details of supposed episodes in the lives of the petitioners.

IX. Under the authority of this court's decisions, considered hereafter, it was grossly improper and highly prejudicial to permit the Government to show the independent and distinct offense of the robbery of Sol Roseman by the petitioners and McMann.

* * *

We now briefly invite the court's attention to decisions of this and other courts applicable to the errors complained of.

A leading case holding the admission of evidence of independent and unrelated crimes to be reversible error, where the competent evidence of guilt is in substantial conflict, is *Boyd* v. *United States,* 142 U. S. 450.

This case is very much in point. In this case, several defendants were jointly indicted for a murder, alleged to have been committed during an armed robbery. The defendants contended that the shooting was in self-defense. The trial court, over objection, permitted the prosecution to show that the defendants had committed a series of robberies, all within less than one month of the alleged robbery and murder of the deceased. The trial court particularly charged the jury that the defendants were not

on trial for these robberies. This court held that the admission of evidence in question required a reversal of the conviction.

Another decision especially pertinent to the case at bar is that of the Circuit Court of Appeals for the Sixth Circuit—the same court which affirmed the conviction of the petitioners—in the case of

Eley v. *United States,* (Circuit Court of Appeals, 6th Circuit, 1941) 117 Fed. (2d) 526,

decided in February of 1941.

In that case the defendant was indicted for a conspiracy in 1938 to sell distilled spirits upon which tax was not paid. Although the defendant did not take the stand, he did put in evidence as to his general reputation for honesty and integrity in the community. The prosecution was permitted to call witnesses to testify that they had purchased liquor from him in 1939, and to allow a former police officer to testify that defendant had requested him to make a false stolen car report in 1938, on the theory that it was rebutting his evidence of good character.

The court said at page 528:

> "The admission of evidence of convictions unrelated in time, or of specific acts, was error. It may not be justified by the rule applicable to cases when guilty knowledge or intent is an essential element of the crime charged so that acts similar in character and related in time may aid in disclosure of intention. Convictions in 1930 can have no possible bearing upon alleged law violations in 1938, and **accusations of specific law violations in 1938 with which the appellant is not charged, and of which he does not stand convicted must be excluded on the often asserted ground that while an accused must be prepared to meet an attack upon his**

character as evidenced by his reputation, he cannot fairly be required without notice to defend against every possible aspersion which may be made against him. Nor can proof of unlawful act, wholly unrelated to the crime charged be considered admissible on any ground." (Emphasis supplied.)

Another decision from this circuit which not only sustains the general propositions relied upon by appellants but which is immediately pertinent is that of

Crinnian v. *United States,* (Circuit Court of Appeals, 6th Circuit, 1924) 1 Fed. (2d) 643.

In that case, a prohibition agent was indicted for soliciting and accepting a bribe. Evidence was introduced showing that some weeks prior to his employment he had been engaged in transactions involving violation of the National Prohibition Act.

The court said at page 645:

"Counsel for plaintiff in error is, we think, wrong in his broad claim that previous violations of the National Prohibition Act cannot ever be relevant to the matter of intent in a prosecution for soliciting a bribe * * *. It is quite conceivable that former conduct of a prohibition agent which involved a violation of the Prohibition Act might be closely enough connected in time or in substance, to be relevant where the **intent** was controlling. Such a case might appear where an established fact permitted ambiguity as to intent as where the taking of money by a prohibition agent might be enticing or might be detecting. There is no such issue here. **Either Crinnian asked for and took the money and is guilty or he did neither and is innocent.** The relative credibility of Crinnian and Stinson was the issue. Proof that Crinnian had formerly

> violated the Prohibition Act could have no bearing on the issue except by showing that he had the 'criminal mind' and this is the very evidence which the common law calls irrelevant.'' (Emphasis supplied.)

In the instant case, as in the case last above cited, there was no ambiguity as to the petitioners' *intent.* To paraphrase the language above quoted, either the petitioners assisted in the kidnapping and robbing of Weiss with criminal intent or they took no part in the enterprise. Therefore proof of independent robberies, otherwise than by petitioners' convictions of such robberies, was inadmissible.

Another decision directly applicable to the present case is

> *Paquin* v. *United States,* (Circuit Court of Appeals, 8th Circ., 1918), 251 Fed. 579.

In that case the defendant was accused of violating the Harrison Anti Narcotic Act. The court permitted the prosecution, over objection, to show that when the defendant was under investigation in connection with a supposed earlier offense—*not the offense for which he was on trial*—the defendant offered a law enforcing officer $50.00 as a bribe. The court held that this error alone required a reversal of the conviction, stating that it was unnecessary to consider any other errors assigned.

It will be observed that in the cases cited above, the error consisted in proof of unconnected offenses. *But in those cases, although it was held improper to prove such independent crimes at all, at least the proof offered was by direct testimony.* Therefore, the sole objection was to the matter proved—not to the means of proving it. Similarly, in this case, the petitioners contend that the testimony of

McMann, and other witnesses as to the robbery of Roseman was incompetent because the robbery of Roseman (like, for example, the robberies in *Boyd* v. *United States,* 142 U. S. 450, cited and considered above) was a completely independent and unrelated offense. The petitioners further contend that the evidence of the attempted bribe of the witness Pigga was entirely incompetent (like, for example, the attempted bribe of the officer in *Paquin* v. *United States,* (8th Circ., 1918), 251 Fed. 579, cited and considered above). However, if it had been proper to show the robbery of Roseman, and if it had been proper to show the attempted bribe of Pigga by any means other than proving the petitioners' conviction of such offenses, petitioners raise no question that the testimony of McMann and other eye witnesses to the robbery and the testimony of Pigga, an eye witness to the offer of the bribe, would have constituted proper evidence of those two particular transactions.

But as to other errors complained of, such as the showing that Banning was suspected of a bank robbery in 1931 and shot in connection with his arrest; that Williams was tried *and acquitted* of a robbery in Omaha, Nebraska; that each petitioner was at a different time shown to be in the company of Graves, a man now convicted for an offense in which neither petitioner is shown to have been implicated, and other of the errors above enumerated petitioners' contention may be stated as follows:

Not only would even the direct testimony of eye witnesses to the supposed crimes in question *not* have been admissible, but, if such crimes might have been shown at all in the instant case, they could *not* have been shown by proof of arrests without convictions, association with a man now shown to be in prison for a jewel robbery, and other such items of mere suspicious circumstances.

We now turn the court's attention to cases in point upon the latter aspect of petitioners' contention that the evidence last above noted was improper.

The following authorities announce the well settled rule that mere arrests and accusations may not be shown to impeach a defendant:

Glover v. *United States* (Circuit Court of Appeals, 8th Circuit, 1906), 147 Fed. 426.

Sutherland v. *United States* (Circuit Court of Appeals, 4th Circuit, 1937), 92 Fed. (2) 305.

6 A.L.R. 1624.

25 A.L.R. 339.

A case upon the subject of improper cross-examination, very much in point with the present case, is *Manning* v. *United States* (Circuit Court of Appeals, 8th Circuit, 1923), 287 Fed. 800.

In that case the defendant was on trial for unlawful sale of narcotics. The case was reversed for improper cross-examination. Counsel for the prosecution asked among other questions one concerning a charge of which the defendant had been acquitted. The court sustained an objection to this question. The court, however, permitted cross-examination as to supposed sales of intoxicating liquor many years before and as to whether the defendant had performed abortions.

The court said at page 805:

> "The manner of cross examination was such as to induce the jury to believe he was guilty of the offenses charged in the indictment because as early as 15 or 20 years ago he had written prescriptions for intoxicating liquor unlawfully."

In *United States* v. *Nettl* (Circuit Court of Appeals, 3d Circuit, 1941), 121 Fed. (2) 927, the court said, at page 930:

> "The effect of innuendo, insinuation and the specious framing of questions has been considered in the cases. 199 Iowa 1073, 26 Mich. Law Review 123 (note), 29 Calif. Law Review 526 (note) and 8 Texas Law Review 588 (note). Its prejudicial character scarcely requires elaboration."

A celebrated case which condemns unfair and prejudicial misconduct is the case of

Berger v. *United States*, 295 U. S. 78.

Mr. Justice Sutherland said at page 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor —indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper

suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

The language quoted above is impressive when it is read against the background of the present case.

Other cases discussing in language pertinent to the instant case the prejudicial effect of improper cross examination are

Little v. *United States,* (Circuit Court of Appeals, 8th Circuit, 1937) 93 Fed. (2d) 401, at page 408.

Mitrovich v. *United States,* (Circuit Court of Appeals, 9th Circuit, 1926) 15 Fed. (2d) 163.

Wilson v. *United States,* (Circuit Court of Appeals, 8th Circuit, 1925) 4 Fed. (2d) 888.

Haussner v. *United States,* (Circuit Court of Appeals, 8th Circuit, 1925) 4 Fed. (2d) 884.

It is not deemed necessary to consider at length cases condemning prejudicial misconduct on the part of the trial court. In the instant case the trial court's characterization of one of the petitioner Williams' witnesses in the Omaha trial as a "fake detective" is clearly an abdication of the judicial office and a descent into forensics which would not have been proper even on the part of counsel. Authorities condemning such conduct are *Egan* v. *United States,* 287 Fed. 958, and cases cited. Indeed, the Circuit Court of Appeals condemned that conduct in the instant case, but held that it was harmless.

In the case of

People v. *Zachowitz,* 254 N. Y. 192, 172 N. E. 466,

the court had occasion to consider a case in which the facts here pertinent were as follows: As the defendant and his wife were proceeding on foot to their home some half block from the scene of the crime, the wife was insulted by an indecent proposal from one of several young men on the street. The defendant and his wife went to their home, where the defendant selected a pistol from a panoply of firearms, which he possessed at his home. He returned to the group of young men and killed one of them.

The trial court permitted the prosecution to show that the gun had been selected from an array of weapons. The case was reversed by a majority of the court. The minority dissented, solely upon the ground that the prosecution had the right to show the defendant's selection of a weapon as bearing upon the degree of malice, expressly stating that the rule would be different had the weapons not been shown to have been in his possession at the time of the crime.

Mr. Justice Cardozo, speaking for the majority of the court, said:

> "To be armed with weapons at the very moment of an encounter may be a circumstance worthy to be considered, like acts of preparation generally, as a proof of preconceived design. There can be no such implication from the ownership of weapons which one leaves behind at home.
>
> "The endeavor was to generate an atmosphere of professional criminality. * * * Brought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping. He was made to answer the charge, pervasive and poison-

ous, even if insidious and covert, that he was a man of murderous heart, of evil disposition."

Mr. Justice Pound, dissenting, said:

"The case would have been quite different if the weapons came into defendant's possession after the killing. The proof would then be of separate crimes unconnected with the killing and its admission reversible error under the *Molineux* case."

No necessity is perceived for multiplying citations of authority to the same effect. The testimony as to the possession of weapons by the petitioner Banning, coupled with the visible and tangible presence of a pistol as a display before the jury, was calculated to and necessarily did create a violent prejudice against the petitioners. Their introduction in evidence was reversible error.

3.

The errors assigned gravely prejudice petitioners and require a reversal of the judgments now under review.

The case of

McCandless v. *United States*, 298 U. S. 342,

considered the question whether an amendment to the Judicial Code (Judicial Code 269, U.S.C.A., 391), which provides that

"the court shall give judgment after an examination of the entire record before the court without regard to the technical errors, defects or exceptions which do not affect the substantial rights of the parties"

modified the common law rule that, although it is incumbent upon an appellant in the first instance to show substantial error, where such error is shown, absence of prejudice

must *affirmatively* appear (affirmatively is italicized by the court).

The court said at page 347:

> "In this situation, Sec. 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421, 70 L. ed. 339, 346, 46 S. Ct. 144; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, 63 L. ed. 853, 856, 39 S. Ct. 435; *Williams* v. *Great Southern Lumber, Co.*, 277 U. S. 19, 26, 72 L. ed. 761, 767, 48 S. Ct. 417."

In the case of *Neeper* v. *United States*, 93 Fed. (2d) 409, the court quotes at page 409, with approval, the following language of Judge Sanborn in the case of *Salerno* v. *United States*, 61 Fed. (2d) 419, at page 424:

> "When, in the prosecution of a defendant, counsel for the government indulge in unfair and improper cross-examination, the only purpose of which is to degrade the defendant and to prejudice the jury against him, the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not have the effect which they were obviously intended to have."

At the utmost, the evidence of guilt in the instant case is frail. The evidence of innocence is substantial and convincing. Petitioners' conviction rests *entirely* upon

the testimony of John McMann, a supposed accomplice. He did *not* meet petitioners in the latter part of April, 1940, as he testified, because the Government has stipulated that Banning was in jail at that time. He was *not* regularly contacted by petitioners at the Raleigh Hotel throughout the summer of 1940 under the name of Jack King, because he was never registered at the hotel by that name. He did *not* spend every week with petitioners in quest of jewelry salesmen, because a Government witness testifies that she lived with him and saw him daily in Peoria from June 7, 1940, until the latter part of July of that year.

The evidence, contradicted by no one except McMann, shows that Banning was a passenger in an American Airlines plane from Louisville to Cincinnati in the afternoon of the 26th of August, the morning of which date McMann fixes as the time that he and petitioners left Chicago on the trip culminating in the robbery of Weiss; and that Williams spent August 26, 27 and 28 in Chicago, his testimony being corroborated by the records of a pawn shop and the Police Department of that City, as well as the testimony of his wife's uncle.

The prosecution was permitted to introduce direct evidence of independent crimes, to show instances of petitioners having been arrested and acquitted or never tried at all for other crimes, to show that each petitioner (separately) associated with Graves and that Graves was convicted of a jewel robbery, to show the possession by petitioner Banning of an armory of deadly weapons and utensils of crime, to show that each petitioner (separately) had been shot or injured in attempting to escape arrest, and to explore the nature of petitioner Williams' defense in an Omaha trial, the trial judge characterizing this defense as

being supported by the testimony of a "fake detective" and as being "an alibi put up to get out of that case."

The prosecution should not now be heard to say that this incompetent evidence and improper conduct did not have the very result it was designed to have.

CONCLUSION.

For the reasons urged in the foregoing argument, the petitioners respectfully pray that this court grant its writ of certiorari to review and reverse the judgment of the Circuit Court of Appeals and the judgment of the District Court herein questioned.

Respectfully submitted,

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